Supreme Court, U.S.
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No. 99-186

IN THE

Supreme Court of the United States

STANDARD INSURANCE COMPANY,

Petitioner,

v.

REX T. KEARNEY, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

T.D. BOLLING, JR.
MARJORIE E. MANNING*
BOLLING, WALTER & GAWTHROP
Attorneys for Respondent
8880 Cal Center Drive
Suite 400
Sacramento, California 95826
(916) 369-0777

* *Counsel of Record*

155285

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE

A. Standard's Denial of Kearney's Claim

Respondent Rex T. Kearney, Jr. was a classic "Type A" litigator with a thriving civil trial practice until November 1992, when he became disabled due to cognitive impairment following open heart surgery[1] and the ravages of severe progressive coronary artery disease. CR 47 at 356-357, 379, 460-462.[2]

In November 1992, Kearney's law firm was covered under a long term disability ("LTD") policy issued by Standard Insurance Company, which provided for the payment of benefits to attorneys who became disabled from their "specialty in the practice of law". CR 47 at 305, 314, 316. "Disability" was defined in the policy as the inability "to perform with reasonable continuity the material duties of your specialty in the practice of law"; or the inability "to earn more than 80% of your INDEX PREDISABILITY EARNINGS while working in your specialty in the practice of law." CR 47 at 314. Kearney's specialty was "trial attorney". CR 16 at 152.

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1. What the petition characterizes as "bypass surgery" (Petition at 1) was actually mitral valve repair, closure of a hole in the heart muscle and five-vessel coronary bypass. Kearney was on heart-lung bypass for over three hours and his aorta was cross-clamped for one hour and two minutes. CR 47 at 460-462. These procedures greatly increased the risk of precisely the type of post-surgical cognitive impairment that Kearney experienced. CR 47 at 354-355.

2. "CR" refers to the Excerpts of Record filed by the parties in the Ninth Circuit, which are cited herein by exhibit and page number.

Following open heart surgery, Kearney submitted to Standard a claim for LTD benefits. CR 47 at 348-349. After paying for approximately two years, Standard did an about-face in September 1994, and despite unanimous agreement among his physicians that Kearney was disabled from practicing as a trial lawyer, gave notice that his benefits would be terminated effective November 2, 1994. CR 47 at 606-608. The threat of termination was followed by a final denial on January 27, 1995. CR 47 at 698.

B. Evidence of Kearney's Disability

When Standard gave notice of termination, it was well aware that every physician who had treated Kearney concluded he was disabled from practicing as a trial lawyer. Documented medical opinions to that effect in Standard's file included the following:

Records of Stephen Morrison, M.D. (treating cardiologist):

- 12/21/92: "I am also concerned about his memory . . . I am impressed that this occurs frequently after bypass surgery, and I am hopeful that this will also significantly improve as it is a very large part of his occupation to have a very adequate and perhaps excellent memory as he is a practicing attorney". CR 47 at 364.

- 4/12/93: Participating in cardiac re-habilitation two times per week. Chief complaints are vertigo, marked fatigue, memory loss associated with coronary artery

bypass surgery. Doing well "from a cardiac standpoint" but with memory loss which is of "great concern" to him. CR 47 at 375.

- 5/11/93: Cardiac condition downgraded from 1 to 2. Cannot return to work for 6-12 months, and then only up to 75%.[3] CR 47 at 373-374.

- 12/6/93: Condition unchanged. Work restrictions: "poor memory". Unable to determine when patient can return to work. Follow-up six months. CR 47 at 390.

Records of David Lehman, M.D., internal medicine (Kearney's personal physician for 20 years):

- 2/26/93: "Unfortunately, the patient is manifesting evidence of cognitive impairment, which has been well reported after coronary artery bypass surgery, particularly, as in Mr. Kearney's situation, when the patient does truly have open heart surgery. Mr. Kearney, as you might recall, did have his mitral valve worked on. . . . At the present time, I would have to consider him completely or near completely disabled, though most of these patients recover function within six months, and I am hopeful that we still might see some improvement in the relatively near future." CR 47 at 354-355.

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3. The petition states Kearney's cardiologist diagnosed him as a functional "Class 1". Petition at 5. That was true in January 1993. CR 47 at 361. It certainly was not true four months later. CR 47 at 373, 390.

- 5/3/93: "Current physical and mental limitations and work restrictions: Occasional PVCs without angina; intellectual impairment precludes legal work." Unable to determine when patient can return to work; follow-up recommended in three months, "but it's been so long, I doubt he'll recover, unfortunately." CR 47 at 379.

Records of Benjamin Kaufman, M.D. (treating psychiatrist):

- 3/1/93: Following surgery in November 1992, patient experienced loss of memory and knowledge and "can't remember things, can't seem to focus" when he works. CR 47 at 567.

- 5/3/93: "More than average loss of memory for this age". "Won't be able to do trial work". "Danger for him is he doesn't know what he doesn't know". CR 47 at 570.

Faced with the foregoing evidence, Standard's claims analyst Robert Case decided a *psychological* evaluation was in order to assess whether cognitive impairment "supposedly resulting from cardiac problems" was present.[4] CR 50 at 922. Randall Smith, who is not a physician, was Standard's choice for this assignment.

Smith saw Kearney on May 18, 1994 for what the psychologist understood was "evaluation of complaints of a

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4. The LTD policy issued by Standard to Kearney's law firm placed a two-year cap on the payment of benefits where disability was caused by a mental disorder. CR 47 at 701.

disability from *maintaining gainful employment.*" CR 47 at 572, emphasis added. His June 14, 1994 report to Standard included the following findings:

- Internally consistent, realistic and truthful responses to testing, with no psychiatric diagnosis suggested. CR 47 at 585.

- Cardiovascular problems on a daily basis coupled with anergy and feelings of muscular weakness. CR 47 at 585.

- Dizziness and chest pain on a weekly basis. CR 47 at 585.

- Syncopal episodes (loss of consciousness) on a monthly basis. CR 47 at 585.

- Average abstract reasoning skills "compared with members of the population at large". CR 47 at 583.

- Unimpaired verbal and visual memory functions based on a delayed recall index score which "merely suggested an absence of significant problems with regard to *retaining information over a period of approximately one-half hour.*" CR 47 at 584, emphasis added.

- "Minimal difficulties in attending and concentrating", which "could be the result of some underlying dysphoria, as well as the hypothesized period of brain edema or possible hypoxia". CR 47 at 584.

Smith concluded that because Kearney's complaints of memory problems, fatigue and dizziness may have pre-dated bypass surgery, and he previously worked despite those symptoms, it followed that any present impediment to full-time employment "as an attorney" was motivational in origin.[5] CR 47 at 590-592.

Armed with Smith's report, Robert Case decided to terminate Kearney's LTD benefits (CR 47 at 604-605), but not without first making it appear there was medical support for this action. To that end, Case commissioned Ronald Fraback, a rheumatologist with no expertise in cardiology, to support his conclusion. CR 47 at 603; CR 50 at 933, 937. He provided the physician with copies of Smith's report and one relatively benign note from Kearney's cardiologist (Dr. Morrison), but *withheld* the records containing physicians' conclusions that Kearney could not return to work as a trial attorney, including all reports from Dr. Lehman, all reports from Dr. Kaufman, and all reports from Dr. Morrison which predated *and postdated* the *one* note Case did supply.[6] CR 47 at 603. Based on Smith's report and the single note from Morrison's chart, Fraback advised there was no reason Kearney could not return to work as a trial attorney. CR 47 at 603.

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5. Kearney suffered a heart attack in 1981 at the age of 43 and underwent angioplasty of the diagonal artery in 1988. CR 47 at 624.

6. The document Case supplied to Fraback was a letter from Dr. Morrison to Dr. Lehman dated July 30, 1993, which advised Kearney continued to feel tired sporadically, had completed two minutes of "stress testing" without significant increase in PVCs during that exercise, and had no chest pain suggestive of angina. CR 47 at 383.

In response to Standard's notice his LTD benefits were about to be terminated, Kearney retained counsel and demanded an independent review. CR 47 at 616-618. Thereafter, Standard was provided with further medical documentation of Kearney's disability including the following:

Records of Irwin Weinreb, M.D. (examining cardiologist):

- 9/9/94: Since 1993, when patient last saw cardiologist Stephen Morrison, has experienced "easy fatigue, episodes of sudden exhaustion, and no energy with dizziness and a tired feeling", "minimal shortness of breath and dyspnea on exertion", and "near-syncopal episodes." CR 47 at 622-623.

- Progressive coronary occlusive atherosclerotic artery vascular disease from 1988 forward. CR 47 at 639.

- Abnormal 12-lead resting electrocardiogram. CR 47 at 629.

- Abnormal stress echocardiogram. CR 47 at 629-630.

- Premature atrial contractions; significantly abnormal left ventricular ejection fraction, cardiomyopathy and mitral valve regurgitation.[7] CR 47 at 629-630.

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7. The ejection fraction ("EF") is a measure of cardiac output, which in turn affects the amount of oxygenated blood flowing to the brain. CR 47 at 620, 648, 650, 654.

- Patient should be precluded "from very heavy work and very severe emotional distress", and "certainly should avoid intense emotional stress and not be on a very tight time schedule." CR 47 at 641.

- "It would appear . . . , being a very knowledgeable attorney, that he certainly could do legal work *outside of trial work*, wherein he can work within his disability described above, both physically and emotionally, without any specific vocational rehabilitation." CR 47 at 641-642, emphasis added.

Records of Robert Bittle, M.D. (examining psychiatrist):

- 11/4/94: Classic Type A obsessive-compulsive personality prone to premature atherosclerotic heart disease with a heavy trial practice, working 200-300 hours per month until bypass surgery. Thoroughly enjoyed his work. CR 47 at 648, 651, 654.

- Residual cardiac impairment following surgery with 30% ejection fraction deficiency on stress echocardiogram. CR 47 at 654.

- ". . . one of the most common complications from open-heart surgery, when the patient is placed on the heart/lung machine, are post operative cognitive dysfunction and deficiencies with memory and concentration

problems. Having treated hundreds of these patients through the years, I find this is not an uncommon complaint and difficulty. . . . There are a percentage of individuals who will remain with neurocognitive behavior problems which appears to be the case in Mr. Kearney's situation." CR 47 at 654-655.

- "Results of neuropsychological testing performed by Dr. Fulton in March 1993 revealed memory/concentration and other cognitive deficits." CR 47 at 656.

- Subtle but significant residual cognitive deficits and their effect on an individual's ability to function in a highly complex, stressful situation requiring the undertaking of multiple tasks at one time would not be revealed by the type of neuropsychological testing performed by Smith. CR 47 at 656-657.

- "I am of the neuropsychiatric opinion that it is highly medically probable that Mr. Kearney's memory/concentration and cognitive deficits do interfere significantly with his ability to function in the highly complex arena as a trial attorney dealing with complicated, multi-factorial issues as is the case in all trials." CR 47 at 658.

On November 22, 1994, Robert Case wrote to Kearney's attorney advising that Standard's medical director had reviewed the reports of Weinreb and Bittle but saw no reason

to change his decision to terminate benefits. CR 47 at 664-665. Dr. Fraback is not Standard's medical director, and he "strongly suggested obtaining the actual echocardiogram for review", since the abnormal ejection fraction noted by Weinreb "would render the claimant almost unable to get up and walk across the room without becoming fatigued". CR 47 at 662; CR 50 at 931. Fraback also urged review of the neurological testing data gathered by Dr. Fulton. CR 47 at 662.

Case forwarded the file to Standard's review unit along with a memo indicating "no evidence" supported Kearney's claim, but the additional records requested by Fraback would be procured. CR 50 at 942. At the same time, Case advised Kearney's counsel that Standard would obtain the echocardiogram film referenced in Weinreb's report and the data generated by Dr. Fulton's neuropsychological testing. CR 47 at 664-665.

Instead, Standard returned to the psychologist Smith, and requested a description of "Mr. Kearney's capacities and limitations to perform his occupation as a trial attorney", extrapolating those findings to a typical work day. CR 47 at 688. In an addendum to his earlier report, Smith admitted not conducting a broad-reaching review of neuropsychological functions (CR 47 at 690), conceded the existence of medical literature establishing a correlation between neuropsychological deficits and bypass surgery (CR 47 at 691-692), failed to extrapolate any finding to the ability to function in the complex arena of trial law (CR 47 at 691-692), cautioned that "*whether there are cardiovascular preclusions to returning to the work of a trial attorney is outside of the realm of my expertise to determine*" (CR 47 at 692), and concluded that from a strictly

psychological standpoint there was no reason Kearney could not return to work "even in a trial setting" (CR 47 at 697).

On January 27, 1995, Kearney's counsel was advised that following "an independent review, conducted separately from the individuals who made the original claim determination," and "after carefully considering all the information in your client's file" Standard had concluded Kearney was not disabled. CR 47 at 698. Standard never did obtain the Weinreb echocardiogram film or the neuropsychological data supporting Dr. Fulton's and Dr. Bittle's conclusions. CR 50 at 937-940.

The promised "independent review" was provided by Mary Ferney, Standard's "QA" "specialist".[8] CR 47 at 701. Ferney is not a physician and had no understanding of the mechanism of ejection fraction, its role in cardiovascular disease, or any other aspect of cardiology. CR 50 at 938-939. Ferney knew Fraback felt it was important to review the echocardiogram and knew Dr. Weinreb's office had offered to make it available. CR 50 at 937-938. However, she deemed it "unnecessary" to gather further data concerning Kearney's impairments. CR 50 at 939. She concluded, unlike every physician involved in the case, that Kearney was not disabled if he could play a set of doubles tennis. CR 47 at 700. She concluded, unlike every physician involved in the case, that the ability to "race" antique cars was inconsistent with cardiac disability.[9] CR 50 at 939. She concluded, in defiance

8. "QA" is Standard's "Quality Assurance" unit, a misnomer if ever there was one.

9. The petition asserts Kearney "restored" and raced cars "as fast as 110-120 miles per hour." Petition at 5. Kearney performed

(Cont'd)

of common sense and common knowledge, that the occupation of "trial attorney" "does not require being in court or on a very tight time schedule." CR 47 at 700. These "facts", coupled with evidence that Kearney "was able to repeat seven digits forward and six in reverse" (CR 47 at 699), were all Ferney needed. The decision to terminate benefits had just saved Standard in excess of $1,172,000. CR 16 at 156-157; CR 43 at 348; CR 47 at 306; CR 71 at 1264.

C. The District Court's Decisions

Kearney filed suit in the United States District Court, Eastern District of California, on March 7, 1995. CR 1 at 1-12. In August 1995, Standard moved for partial summary judgment, seeking a determination that its denial of benefits should be afforded deferential review with the scope of evidence limited to the administrative record. CR 9-11. Far from agreeing with Standard's assessment of the LTD policy (Petition at 7), the court concluded *de novo* review was proper because "Standard's plan does not unambiguously reserve discretionary power to determine eligibility for LTD benefits." CR 26 at 250. In its order granting Standard's subsequent motion for summary judgment, the district court applied the *de novo* standard, weighed the evidence in the administrative record, and concluded Kearney had not met his burden of establishing disability. App. D at 92a-97a.

(Cont'd)

cosmetic work on antique cars, and "raced" occasionally, but as Dr. Weinreb noted, "these were not races that they would try to finish first, but races between individual cars on straight-aways and on curves, to see how they handled their cars against one another." CR 47 at 633.

D. The Ninth Circuit Panel Decision

In its April 21, 1998 amended decision, the Ninth Circuit reversed and remanded on the ground the record was replete with triable issues of material fact. App. C at 80a-83a. The panel concluded *de novo* review was appropriate for two reasons: the absence of plan language conferring discretionary authority to decide eligibility for benefits, and the presence of evidence suggesting Standard denied the claim in furtherance of its own interests rather than on the basis of medical proof. App. C at 65a-74a. The panel also found the district court erred in limiting the scope of review to the administrative record, given the complexity of the issues involved. App. C at 74a-80a.

E. The Ninth Circuit En Banc Decision

Standard requested rehearing *en banc*, citing a conflict between *Kearney* and *Snow v. Standard Insurance Co.*, 87 F.3d 327 (9th Cir. 1996).[10] App. A at 4a-5a. The Ninth Circuit granted rehearing, and issued its decision on April 28, 1999. The "majority" agreed that the plan's requirement of "satisfactory written proof" of disability was at best ambiguous with respect to the extent of discretion conferred, and "at worst" did not "confer discretion at all because it does not say that it does." App. A at 12a. Having concluded Kearney was entitled to *de novo* review without any deference to Standard's decision, the majority declined to decide whether less deferential review would be appropriate on the additional ground that Standard acted in derogation of its fiduciary responsibilities. App. A at 11a-12a, n.2.

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10. While the *Snow* opinion contained no construction of any identifiable policy language, Standard urged examination of the *record* in *Snow* for proof that the two decisions actually construed identical plan provisions. App. A at 28a-29a, n.1.

REASONS FOR DENYING THE WRIT

Standard urges review is necessary to resolve a division among the courts of appeals "on the important ERISA standard of review issue presented", namely, whether an ERISA plan which requires submission of "satisfactory written proof" of disability conveys to the administrator discretion to determine eligibility for benefits.[11] Petition at *i*, 10-13. Four cases are highlighted as evidencing this conflict: *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243 (2nd Cir. 1999); *Perez v. Aetna Insurance Co.*, 150 F.3d 550 (6th Cir. 1999); *Patterson v. Caterpillar, Inc.*, 70 F.3d 503 (7th Cir. 1995); and *Kearney v. Standard Insurance Co.*, 175 F.3d 1084 (9th Cir. 1999). Petition at 10-14.

Of the cited decisions, only *Kearney* and *Kinstler* construe virtually identical plan language. The provision deemed dispositive by the Ninth Circuit in *Kearney* provides:

> . . . Standard will pay the LTD benefit described in Part 8 upon receipt of satisfactory written proof that you have become disabled while insured under the group policy.

App. C at 54a. *Kinstler* construed plan language which states:

> We will pay a Monthly Benefit if an Insured: . . . submits satisfactory proof of Total Disability to us.

Kinstler, supra, 181 F.3d at 251. In reliance on the majority in *Kearney*, the Second Circuit concluded the provision in question

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11. It has been and continues to be Kearney's position that even if such language constituted a grant of discretion, that fact would not assist Standard in this case because Kearney's law firm was the plan administrator. CR 16 at 179; App. A at 5a-6a, fn. 1.

was at best semantically ambiguous, and in any event could not be read as conferring discretion to determine eligibility for benefits. *Id.* at 251-252. Clearly, the decisions in *Kearney* and *Kinstler* are in accord.

The plans addressed in *Patterson* and *Kearney* are not alike. The key provision quoted in *Patterson* provides:

> Benefits will be payable only upon receipt by the Insurance Carrier or Company of such notice and due proof, as shall be from time to time required, of such disability.

Patterson, supra, 70 F.3d at 505. Moreover, the *Patterson* opinion offers no analysis of the foregoing language, much less one that conflicts with the rationale expressed in *Kearney*. The Seventh Circuit merely concluded the language in question "is similar to provisions that we previously have held sufficient to apply the arbitrary and capricious standard of review." If the appellant in *Patterson* even raised the issue of the administrator's discretion, that fact is not reflected in the opinion.

The true focus of the petition lies in its comparison of *Kearney* and *Perez*. According to Standard, two courts sitting *en banc* construed "materially indistinguishable" plan language. Petition at 11. Respondent disagrees. The portion of the Aetna plan quoted in *Perez* provides:

> Written proof of total disability must be furnished to [Aetna] within ninety days after the expiration of the [first 12 months of disability]. Subsequent written proof of the continuance of such disability must be furnished to [Aetna] at such intervals as

> [Aetna] may reasonably require. . . . [*Aetna*] *shall have the right to require as part of the proof of claim satisfactory evidence . . . that [the claimant] has furnished all required proofs for such benefits.*

Perez, supra, 150 F.3d at 555; italics in original.

The first two sentences of the Aetna plan embody a proof of claim requirement which is similar to Standard's demand the claimant submit "satisfactory written proof" of disability. But the Sixth Circuit found the proof of claim requirement *insufficient* to confer discretion. *Perez, supra* at 555-557. It is the third quoted sentence of the Aetna plan, according to *Perez*, which embodies Aetna's discretion, i.e., the insurer's reservation of "the right to require as part of the proof of claim satisfactory evidence . . . that [the claimant] has furnished all required proofs for such benefits." *Id.* at 556-557. Frankly, the language deemed dispositive is patently ambiguous, a fact which should have compelled the Sixth Circuit to apply the *de novo* standard of review. Nevertheless, one possible construction of the provision in question is that Aetna reserved to itself the right to determine whether evidence of disability was satisfactory before any benefit would be paid. The plan examined in *Kearney*, by contrast, provides Standard with no choice but to pay LTD benefits once the claimant submits satisfactory written proof of disability.

For the foregoing reasons, respondent respectfully submits that this case is a poor vehicle for resolution of the question raised in the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

T.D. BOLLING, JR.
MARJORIE E. MANNING*
BOLLING, WALTER & GAWTHROP
Attorneys for Respondent
8880 Cal Center Drive
Suite 400
Sacramento, California 95826
(916) 369-0777

* *Counsel of Record*